

Protest of)	Date: July 11, 1990
ALOHA AIRLINES)	
Under Solicitation No. HAPSEG 90-01)	P.S. Protest No. 90-20

DECISION

Aloha Airlines (Aloha) timely protests the contracting officer's evaluation of its offer and award to another offeror on Segment SF169 (Kona to Honolulu, HI) of Solicitation No. HAPSEG 90-01 issued by the San Francisco Transportation Management Service Center seeking offers for the air transportation of mail between various points in Hawaii and to other points in the Pacific Islands. The solicitation, issued February 14, 1990, requested offers to provide service on Segment SF169 within a window with a tender time of 3:00 PM and a delivery time of 5:00 PM. On March 21, four offers were received offering service within the solicited window of Segment SF169 with Aloha ranked highest of the four based on its lower price.¹¹

Discussions were held with the three offerors determined to be within the competitive range.¹⁷ During the discussions, the offerors were instructed to include with their best and final offers (BAFOs) the flight numbers and schedules of the aircraft which would be used to provide the solicited service.¹⁷ In its BAFO, Aloha listed a delivery time for Segment SF169 of 5:15 PM, outside the solicitation's 5:00 PM window and provided the flight number and schedule of two flights which both arrived after the proposed delivery

^{1/}The evaluation criteria of the solicitation states that offers will be evaluated on the basis of price.

^{2/} The contracting officer mistakenly refers to the discussions held with offerors within the competitive range as "negotiations." The latter term although correct under the Postal Contracting Manual (the former contracting regulations governing postal procurement activities) has been superseded under the Procurement Manual (PM) by the term "discussion." See PM 4.1.5 a. 3. For the current use of "negotiation" in postal procurement regulations see PM 4.1.5 a. 4.

^{3/}The contracting officer indicates that this information was "to verify and demonstrate" the offeror's ability to meet the proposed service window specified in the its proposal.

time.^{1/}

After a review of the flight information provided with Aloha's BAFO, the contracting officer ranked Aloha's proposal below that of Hawaiian Airlines (Hawaiian) and awarded the segment to Hawaiian on April 23. On April 26, Aloha was notified that Hawaiian had received award. By letter of April 27, Aloha timely protested the evaluation of its proposal and the award to Hawaiian.

In its protest Aloha asserts it mistakenly provided the wrong flight numbers and times with its BAFO and that the contracting officer should have relied on his knowledge of Aloha's current service to overcome this error.^{4/} Aloha challenges the contracting officer's right to use the requested flight information in evaluating its proposal since the offer sheets included with the solicitation package do not require specific flight information. As relief, Aloha requests Hawaiian's contract on Segment SF169 be terminated and the contract awarded to Aloha.

In his report to this office, the contracting officer asserts that under the terms of the solicitation an offeror could propose to provide the solicited service or could offer a different service, which, if accepted for award, would be made a part of the contract. Therefore, acceptance of Aloha's BAFO would have allowed Aloha to perform service with the flights listed in response to the request for that information. This would have resulted in an unacceptably late delivery time. He states that the award to Hawaiian was appropriate in that it was the lowest priced technically acceptable proposal. Finally, the contracting officer states that it is the offeror's responsibility to assure that the information provided is accurate and further that he had no way of knowing from the provided information that Aloha intended to use two flights that would have conformed to its offered service.

^{4/}In his report, the contracting officer states that the solicitation allowed for such alternate service proposals. Our review of the solicitation discloses no reference to the acceptability of proposals outside the solicited service windows and the evaluation criteria provide no means of ranking alternate service proposals since offers were to be evaluated only on the basis of price. Rather than allowing for alternative proposals, the solicitation states that the contracting officer will reject any offer not meeting the requirements of the solicitation without conducting "negotiations" [sic] with the offeror.

^{5/}Aloha indicates that the April 1990 Official Airline Guide (OAG) lists two Aloha flights which operate within the required service window: Flight 109 departs Kona at 3:00 PM and arrives at Honolulu at 3:45 PM and Flight 281 departs Kona at 4:00 PM and arrives at Honolulu at 4:34 PM. Aloha notes that it was the incumbent contractor on the segment providing service within the solicited window.

Discussion

In requesting information regarding Aloha's ability to perform the solicited service and then utilizing this information to evaluate Aloha's proposal, the contracting officer conflated a responsibility determination with an evaluation of the offeror's proposal.^{1/} Unless a solicitation requires otherwise, whether an offeror has the capacity to perform a contract is usually reviewed in the determination of an offeror's responsibility. TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987. If the solicitation had required the submission of flight data and schedules, review of this information would have been permissible as part of the evaluation to the extent permitted by the stated criteria. Id. Here the evaluation criteria did not incorporate a review of specific flight data and the evaluation of Aloha's proposal based on flight information requested as an element of its BAFO was inappropriate.

The contracting officer's statement that the solicitation allowed for proposals outside the solicited service window is incorrect. The evaluation of proposals must be made in accordance with the criteria stated in the solicitation. POVECO, Inc., P.S. Protest No. 85-09, June 12, 1985. The solicitation states that the contracting officer would reject all offers not meeting the requirements of the solicitation. The solicitation included, in Specifications Part B, the times within which tender and delivery of mail had to be accomplished. Although proposals submitted in response to a request for proposals need not be responsive in the technical sense, see Sea-Land Service, Inc., P.S. Protest No. 80-18, June 30, 1980, n.2, restrictions on the submission of proposals stated in the solicitation must be applied. Sea-Land Service, Inc., P.S. Protest No. 78-16, June 6, 1978. Rather than ensuring that proposals complied with the solicitation's requirements, the contracting officer apparently interpreted the solicitation to allow for the submission of proposals outside the solicited service window.

When the contracting officer discovered the discrepancy between the required service window and the proposed flights in Aloha's BAFO, he should have contacted Aloha for a clarification of its proposal.^{2/} The use of clarification is not limited to an offeror's initial proposal but is equally available to eliminate minor irregularities, informalities, or apparent clerical mistakes in a BAFO.

The requested schedule information properly should have been used to establish Aloha's responsibility rather than as an element of the evaluation of its proposal. In determining responsibility, a contracting officer is not to rely solely on information provided by the prospective contractor. See PM 3.3.1 e.; AHJ Transportation, Inc., P.S. Protest No. 88-85, February 2, 1989. Thus, information such as Aloha's previous

^{6/}PM 3.3.1 requires that award be made only to responsible prospective contractors. In order to be determined responsible, a prospective contractor must "[b]e able to comply with the required or proposed delivery schedule...." PM 3.3.1 b. 2.

^{7/}"Clarification" is defined as "communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal." PM 4.1.5 a. 2.

contract performance and its OAG schedule was available to, and could have been used by, the contracting officer. The regulation also contemplates additional communication with the offeror for purposes of obtaining or clarifying information needed to determine responsibility. PM 3.3.1 e. 4.^{1/}

In light of the identified flaws in the consideration of Aloha's offer, we next consider the relief available. Remedying the contracting officer's improper actions in this solicitation would require the termination for convenience of the segment contract with Hawaiian. This office has stated:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of the performance, the cost to the Government, the urgency of the requirement, and the impact of the termination on the accomplishment of the agency's mission. (citation omitted).

Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978.

After considering these factors with regard to this protest, the procurement's defects require the termination for convenience of Segment SF169. The actions of the contracting officer constitute serious procurement deficiencies; Aloha was prejudiced by the contracting officer's actions and it appears that but for those actions Aloha would have received award; nothing indicates that either party acted in other than good faith; contract performance is only about 20% complete; the procurement was conducted without special urgency; the cost of termination would be approximately \$1332,^{1/} and there apparently would be no adverse impact on the accomplishment of the Postal Service's mission by the termination.

^{8/}The cited section states:

Communication with a prospective offeror [sic] for the purpose of obtaining or clarifying information needed to determine responsibility is not 'discussion' as defined in 4.1.5, and does not require that discussions be held with all those in the competitive range (see 4.1.5.g.1).

PM 3.3.1 e. 4.

^{9/}The termination for convenience clause of the contract (clause 26) states that the contract may be terminated for convenience upon 28 days' written notice. Upon such termination the Postal Service shall be liable to the contractor for an indemnity equal to the contract rate x the applicable minimum weight x the number of required dispatches in a given 14-day period.

The contracting officer is directed to terminate the present contract on Segment SF169 for convenience in accordance with the terms of the contract. The contract shall then be awarded to Aloha at the rate specified in its proposal for it to perform service within the solicitation's specified service window.^{10/}

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/2/93]

^{10/}The award of other segments to Aloha under this solicitation indicates the contracting officer considers Aloha responsible. Without this latter fact, directing award would be inappropriate since it is well-established that this office will not determine matters of responsibility. Levi Carver, On Reconsideration, P.S. Protest No. 76-25, October 28, 1976; Equipment Marketing Consultants Corporation; Pitney Bowes Inc., P.S. Protest Nos. 89-34, 89-42, July 27, 1989.